

FIRST APPEAL No. 94 OF 1996

Against the judgment and decree dated 23.11.1995(degree signed on 07.12.1995) passed by Sri Satyendra Prasad Singh, Sub Judge III, Katihar in Title Suit No.27 of 1989/7 of 1992.

MOHAMMAD ABDUL QUADIR

..... Defendant-first party/Appellant

Versus

SHAIRA BANO & OTHERS

..... Plaintiffs-Respondents

For the Appellant

: Mr. P.K.Jaipuriyar, Advocate
Mr. Anshuman Jaipuriyar, Advocate

For the Respondent Nos.1 to 9

: Mr. V. Nath, Advocate
Mr. Vimal Kumar, Advocate
Mr. Ashok Kumar, Advocate

Dated : 21st day of June, 2011

P R E S E N T

THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

J U D G M E N T

**Mungeshwar
Sahoo, J.**

The defendant no.1 has filed this First Appeal against the judgment and decree dated 23.11.1995 passed by Satyendra Prasad Singh, the learned Sub Judge III, Katihar in title suit no.27 of 1989/7 of 1992 decreeing the plaintiff-respondent's suit for specific performance of contract dated 08.12.1980.

(2) The plaintiffs filed the aforesaid title suit no.27 of 1989 praying for specific performance of contract on the grounds that the suit land bearing R.S. khata no.151, plot nos.213, 214 and 217 measuring 10

bighas of Mauja- Durgapur, District- Katihar more fully described in Schedule-A is recorded in the name of Abdul Quadir. The father of the plaintiff was recorded as Sikimdar. The said plot numbers correspond to M.S. Plot Nos. 1629, 1630, 1631, 1637, 1638, 1640, 1641, 1717, 1718, 1795, 1827, 1828, 1829, 1833, 1834, 1835, 1836 and 12408 measuring more or less 12 bighas of land. The defendant no.1 out of the said lands, agreed to sell 10 bighas of land to the plaintiff for a consideration of Rs.94,951. It was agreed between the parties that title suit no.1 of 1979 filed by Samsul Haque against the defendant no.1 with respect to the suit land, if will be disposed of in favour of the defendant no.1 within three years, the sale deed will be executed and registered within one month thereafter on payment of balance consideration amount of Rs.84,951 as Rs.10,000 was paid at the time of agreement. The said title suit no.1 of 1979 was dismissed by 1st Additional Sub Judge, Katihar. Then the plaintiff approached the defendant on several dates and offered the balance consideration amount of Rs.84,951 but he evaded to receive and execute sale deed. On 29.06.1988, Advocate notice was served on defendant no.1. The defendant replied that he had never received Rs.10,000 as advance money and that the plaintiff never offered the balance consideration amount. The title suit no.1 of 1979 was dismissed for default and the plaintiff of that suit has filed Misc. Case No.1 of 1988 for restoration of title suit no.1 of 1979 which is still pending. Since there was agreement between the parties that if the title suit no.1 of 1979 will be decided within three years in favour of the defendant no.1, the defendant will execute and register the sale deed but when it was not decided within the said period, the said agreement become void

agreement and unenforceable. It may be mentioned here that although written statement was filed by the defendant no.1, he did not contest.

(3) The defendant no.14 filed written statement and contested the suit. She is subsequent purchasers from defendant no.1. According to her also, the agreement dated 08.12.1980 is barred under Section 29 and 35 of the Indian Contract Act and as the agreement is contingent contract, it cannot be enforced in law. The suit is based on contingent contract i.e. on the happening within unspecified time such as decree of title suit no.1 of 1979 in favour of defendant no.1. The defendant no.1 had agreed to execute the sale deed if within three years title suit no.1 of 1979 would be disposed of in his favour. When the said event did not take place within three years, the contract become void under Section 35 of the Contract Act. Besides taking various other pleas, she alleged that in September 1992, she purchased 3 katha out of R.S. Plot No.217 and 1 katha out of R.S. Plot No.218 from defendant no.1 in September 1992 pursuant to the Jarbayanama in her favour on 04.03.1992 executed by defendant no.1. After construction of a building she is residing in the said house. She had no knowledge about previous contract.

(4) On the basis of the above pleadings, the learned Court below framed the following issues:

- I. Is the suit as framed maintainable?
- II. Has the plaintiffs got any valid cause of action for the suit?
- III. Is the suit barred by Law of Limitation?
- IV. Whether the registered deed of Jarbayanama dated 8.12.80 said to have been executed by defendant no.1 in favour of the plaintiffs genuine,

valid and legal and whether the plaintiffs were ready and willing to perform their part of contract or not?

V. Whether the defendant 2nd party are the purchasers for the value for the suit lands without having any notice of the previous contract for sale between the plaintiffs and defendant no.1?

VI. Whether the lands in possession of defendant no.14 is outside the terms of the Baibianama dated 18.12.80 or not?

VII. Whether the plaintiffs are entitled to a decree for specific performance of contract for sale or not?

VIII. To what other relief or reliefs if any the plaintiffs are entitled to get?

(5) After trial, the learned Court below came to the finding that the plaintiffs were always ready and are still ready to perform their part of the contract. The contract dated 08.12.1980(Exhibit-1) is valid document and it was executed by the defendant no.1 on receipt of advance Rs.10,000 and decreed the suit.

(6) Mr. Jaipuriyar, the learned counsel appearing on behalf of the appellant raised only one question of law regarding the construction of Exhibit-1, the alleged contract dated 08.12.1980 and submitted that since the appellant had not adduced any evidence, he will not challenge the finding regarding the readiness and willingness of the plaintiff and also is not in a position to deny that Rs.10,000 was not received by him. The learned counsel further submitted that even if the defendant no.1 did not contest, it was the duty of the Court to have properly constructed the agreement (Exhibit-1) itself in its proper prospective but the learned Court below has wrongly constructed the agreement and decreed the suit. According to the learned counsel, when the suit was not decided within three years in favour of the appellant, the agreement become void

according to Section 35 of the Indian Contract Act. Further, the agreement itself was contingent agreement as the time was uncertain. Further, restoration application being Misc. Case No.1 of 1988 filed by the plaintiff of title suit no.1 of 1979 was pending, therefore, the terms and conditions of the contract dated 08.12.1980 was not fulfilled and, therefore, the learned Court below could not have decreed the suit. The learned counsel further submitted that subsequently the Miscellaneous Case was allowed and the title suit no.1 of 1979 has been restored to its original file and the case is still pending. On these grounds, the learned counsel submitted that the impugned judgment and decree are liable to be set aside.

(7) On the other hand, Mr. V. Nath, the learned counsel appearing on behalf of the plaintiff-respondent nos.1 to 9 submitted that the appellant did not examine himself in support of his case and, therefore, adverse inference should be drawn against him. Whatever statement made by him in his written statement cannot be relied upon as pleading is not the proof of the fact and the appellant has not adduced any evidence. The learned counsel further submitted that in case of agreement to sell of immovable property, time is not considered to be the essence of the contract. It was agreed between the parties that if the title suit no.1 of 1979 is decided in favour of the appellant, the appellant will execute the sale deed within one month thereafter. The title suit no.1 of 1979 was dismissed may be dismissed for default but it will mean that it is decided in favour of the appellant who was defendant in that suit and, therefore, the plaintiff offered the balance consideration amount but he refused. In such circumstances, it cannot be said that there was

uncertainty and the agreement is contingent contract and unenforceable. The learned Court below has considered all these aspects and submissions of the appellant in the judgment and has assigned good reason for not believing and relying the case of the appellant, therefore, the findings of the learned Court below cannot be interfered with in this First Appeal. So far pendency of title suit no.1 of 1979 is concerned, the learned counsel submitted that no such evidence has been produced before the trial court or before this Appellate Court by the appellant and, therefore, the argument of the learned counsel is without any basis. On these grounds, the learned counsel submitted that the First Appeal is liable to be dismissed with cost.

(8) In view of the above rival contentions of the parties, the only point arises for consideration in this appeal is as to "whether the agreement dated 08.12.1980(Exhibit-1) is enforceable in the eye of law by the plaintiff against the defendant" and "whether the impugned judgment and decree are sustainable in the eye of law?"

(9) According to the plaintiff's case, the defendant no.1 agreed to sell the suit property measuring 10 bighas and the agreement was executed on 08.12.1980(Exhibit-1). The consideration amount was fixed at Rs.94,951. Rs. 10,000 was paid in advance. Here, the defendant-appellant has not contested the suit, therefore, the execution of Exhibit-1 and receiving of Rs.10,000 as advance will be deemed to have been admitted. Only the submission is that the suit is based on contingent contract, therefore, it is unenforceable. In view of the submissions of the parties, here, oral evidences are not at all required to be gone into.

Entirely it depends upon the construction of Exhibit-1, whether it is contingent contract and whether it is unenforceable in law.

(10) Exhibit-1 clearly recites that title suit no.1 of 1979 is pending with regard to the suit property and during the pendency of that title suit, execution and registration of the sale deed will not be possible. It further recites that the appellant has firm believe that the said suit will be decided within three years in his favour and within one month from the decision in favour of the appellant, sale deed will be executed. It is better to quote the exact wording of this portion of Exhibit-1 which is in Hindi:

"मैं विश्वास के साथ वादा करता हूँ कि अधिकतम अवधि तीन वर्ष के अंदर वर्णित भूमि के सम्बन्धीत टाइटल वाद का निपटारा मेरे पक्ष में हो जायगा और टाइटल वाद के निपटारा पक्ष में होने के एक माह के अंदर वर्णित भूमि का विक्रय पत्र वर्णित मूल्य में लेख्यधारी के नाम सम्पादन कर दूँगा और वक्त केवाला रजिस्ट्री के व्याना वाद वॉकी मूल्य मो0 84951 चौरासी हजार नौ सौ एकावन रुपये लेख्यधारी से ले लूँगा । तीन वर्ष की अवधि के अंदर रजिस्ट्री लेख्यधारी के पक्ष में कर दूँगा ।"

(11) It is well settled principles of law that in construing written contract, Courts ought not to resort to evidence except to the extent of necessary for clarifying what is ambiguous in the contract. Contracts ought to be construed according to the primary and natural meaning of the language only the contracting party has chosen to express the terms of their mutual agreement. We have seen above the terms and conditions arrived at between the parties. There is no ambiguity at all. In clear

terms, the parties agreed to the effect that the title suit no.1 of 1979 will be decided in favour of the appellant within three years positively.

(12) The learned counsel for the respondents submitted that the intention of the parties was that after disposal of the title suit in favour of the appellant, the sale deed will be executed. The defendant-appellant did not contest the suit and, therefore, the case of the plaintiff was uncontroverted. As the defendant-appellant himself did not enter to the witness box adverse inference should be drawn against him. The learned counsel relied upon **A.I.R.1999 S.C.1441(Vidhyadhar v. Mankik Rao & Anr.)**, **A.I.R.1960 Patna 223 (DB) (Devji Shivji v. Mohan Lal Odhabji Thacker & Ors.)**, **A.I.R.1927 Privy Council 230(Sardar Gurbakhsh Singh v. Gurdial Singh & Anr.)** and **A.I.R. 2007 S.C. 2025(Adivekka & Ors. v. Hanamavva Kom Venkatesh & Anr.)**. From perusal of these decisions, it appears that in all these decisions, the same principles have been laid down that if a party to the suit is not examined himself as a witness adverse inference can be drawn against that party. The true object to be achieved by Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicious attaching to it. In the present case at our hand, as stated above, construction of Exhibit-1 is not dependent on oral evidences. No adverse inference can be drawn against the appellant contrary to the terms and conditions of the agreement, Exhibit-1, even if he has not been examined. The plea of construction of Exhibit-1 is purely a question of law and it does not depend on oral evidence. The suit of the plaintiff is purely based on Exhibit-1. Therefore, Exhibit-1 requires a fair construction. If the

condition mentioned in the document is not vague, no evidence can be admitted to admit vagueness and likewise, if the condition mentioned in the document is vague or uncertain, no evidence can be admitted to remove the said vagueness or uncertainty under the provision of Section 93 of Evidence Act. No terms and conditions should be considered as superfluous if it can be given some reasonable meaning. There can be no presumption that the words have been used without meaning. Therefore, the Court must as far as possible avoid a construction which would render the words used by the author of documents meaningless and futile and reduce to silence any part of document and make it inapplicable.

(13) Section 35 of the Indian Contract Act reads as follows:

"Section 35. When contracts become void, which are contingent on happening of specified event within fixed time.- Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced, which are contingent on specified event not happening within fixed time.- Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired, and such event has not happened, or before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within the year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The

contract may be enforced if the ship does not return within a year, or is burnt within the year.

(14) In view of the above provision, it becomes clear that in the present case, the appellant agreed on firm belief that the tile suit no.1 of 1979 will be decided within three years in his favour and if it is decided in his favour within three years, he shall execute sale deed within one month thereafter. There is no ambiguity so far words used in the contract are concerned. Admittedly, title suit no.1 of 1979 was not decided within three years in favour of the appellant. The said suit was dismissed for default in the year 1988 and a Miscellaneous Case No.1 of 1988 was pending on the date of decision for restoration of the said title suit. It may be mentioned here that in that suit, the present appellant is the defendant and he is not responsible for either dismissal or restoration. Further, the time limit fixed by the parties was three years. The intention of the parties appears that if within the said three years the suit is decided in favour of the appellant then, the appellant will execute the sale deed. When the said suit was not decided within the said fixed time, the agreement become void.

(15) The learned counsel for the respondents submitted that in the contract for immovable property, time is not the essence of contract. So far this submission is concerned, there is no dispute about the settled principles of law. Here, it is not the case that there was simple agreement between the parties and the appellant agreed to execute and register sale deed within three years. Here, the time was fixed for happening of a particular event i.e. the decision in title suit no.1 of 1979 in favour of the

appellant. Therefore, this is a contingent contract and shall be governed by Section 35 of the Indian Contract Act.

(16) If the submission of the learned counsel for the respondents is accepted then there will be uncertainty of time regarding the disposal of title suit no.1 of 1979. Here, the circumstances show that the plaintiff believing that the suit will be decided within three years, he received only Rs.10,000 as earnest money. The said intention can now be made indefinite by saying that the time is not the essence of the contract. Once the contract had been worked out, a fresh liability could not be thrust upon a contracting party. The performance of the contract in the present case is dependent on the decision of title suit no.1 of 1979 in favour of the defendant within three years. Admittedly, as stated above, the suit was never decided within said three years. In such circumstances, after 8 years, when the suit was dismissed for default, the Court of law will not enforce the contract in favour of the plaintiff.

(17) The learned counsel for the respondents submitted that the intention of the party was not that it must be decided within three years. If this submission is accepted then so far time limit is concerned, it will be uncertain and, therefore, also the contract will suffer from uncertainty and is not enforceable according to the provision as contained in Section 29 of the Indian Contract Act.

(18) From perusal of the impugned judgment and decree, it appears that the learned Court below has not considered all these aspects of the matter and swayed away by finding that in contract for sell for immovable property, time is not the essence of contract. The learned

Court below has not at all considered the unambiguous and clear terms agreed between the parties in Exhibit-1. Therefore, the judgment and decree passed by the learned Court below are unsustainable in the eye of law. I find that the agreement dated 08.12.1980(Exhibit-1) is unenforceable in the eye of law and the learned Court below could not have granted the decree for specific performance of contract.

(19) However, since the payment of Rs.10,000 is admitted, plaintiffs-respondents are entitled to refund of the said amount with simple interest at the rate of 6% per annum from the date of suit till realization.

(20) In the result, this First Appeal is allowed. The impugned judgment and decree are set aside. The plaintiff's suit for specific performance is dismissed. However, the plaintiff may recover the amount of Rs.10,000 with simple interest at the rate of 6% per annum from the date of institution of the suit. No order as to cost.

(Mungeshwar Sahoo, J.)

Patna High Court, Patna
The 21st June, 2011
Saurabh/A.F.R.